87-375

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY, FLORIDA, MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL, and THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,
Petitioners,

v.

MICHAEL DENNIS STRAUB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

RICHARD E. NELSON
NELSON, HESSE, CYRIL,
SMITH, WIDMAN & HERB
2070 Ringling Boulevard
Sarasota, FL 34237
(813) 366-7550

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the court of appeals erred when it held that a non-indigent prisoner, who chooses not to employ counsel, must be afforded access to a law library to defend a civil forfeiture action.

LIST OF PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	7
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT	8
II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS	10
CONCLUSION	15

TABLE OF AUTHORITIES

Cases: Page

Block v. Rutherford, 468 U.S. 576 (1984) 9
Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) 10
Bounds v. Smith, 430 U.S. 817 (1977) ..... *passim*
Corgain v. Miller, 708 F.2d 1241 (7th Cir. 1983) 12
Crocker v. Mulligan, 788 F.2d 809 (1st Cir. 1986) 13
Faretta v. California, 422 U.S. 806 (1975) 11
Gometz v. Henman, 807 F.2d 113 (7th Cir. 1986) 12
In re Green, 669 F.2d 779 (D.C. Cir. 1981) (per curiam) 13
Johnson v. Avery, 393 U.S. 483 (1969) 9
Nordgren v. Milliken, 762 F.2d 851 (10th Cir.), *cert. denied*, 106 S. Ct. 593 (1985) 13
Pennsylvania v. Finley, 107 S. Ct. 1990 (1987) 9
Procunier v. Martinez, 416 U.S. 396 (1974) 9
Ross v. Moffitt, 417 U.S. 600 (1974) 8
Smith v. Bounds, 538 F.2d 541 (4th Cir. 1975), *aff'd, Bounds v. Smith*, 430 U.S. 817 (1977) 8
Spates v. Manson, 644 F.2d 80 (2nd Cir. 1981) 12
State of Florida v. Haskell, No. 86-0830-CF-A-NI (12th Jud. Cir. March 4, 1987) 7
United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978), *cert. denied*, 482 U.S. 911 (1979) 10
United States ex rel. George v. Lane, 718 F.2d 226 (7th Cir. 1983) 11, 12
United States v. Wilson, 690 F.2d 1267 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983) 11, 12
Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979) 10
Wilson v. Zarhadnick, 534 F.2d 55 (5th Cir. 1976) 5, 10, 13

Statutes:

U.S. Const., amend. XIV 2
28 U.S.C. § 1254(1) 2
42 U.S.C. § 1983 3
Fla. Stat. § 27.52 (1985) 4
Fla. Stat. § 27.52(2) (b) (1985) 4
Fla. Stat. § 27.52(2) (c) (1985) 5

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Geoffrey Monge, Sheriff of Sarasota County, Florida, Max F. Frimberger, Captain of the Sarasota County Jail, and the Chairperson of the Sarasota County Board of County Commissioners hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 815 F.2d 1467. The opinion of the district court (App., *infra*, 18a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1987. On July 15, 1987, Justice White extended the time for filing a petition to and including September

2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const., amend. XIV) provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

1. On March 2, 1982, respondent, Michael Dennis Straub, was arrested and charged under Florida law with the armed robbery of a bank. Respondent was incarcerated in the Sarasota County Jail pending trial until his transfer to a Florida State prison in September 1982 after he was convicted. During his incarceration and prior to his plea in the criminal case, civil forfeiture proceedings were brought concurrently in state court against respondent's automobile which was used in connection with the robbery.

After his arrest, respondent submitted to the state trial court an affidavit of insolvency stating that he had no assets or income. On the basis of that affidavit, an Assistant Public Defender was appointed to represent him in his state criminal case.[1] Contrary to respondent's affidavit, he was at that time receiving at least $1200 per month in income from the Veterans Administration. Straub, Tr. 33, 90, 127.[2] Further, in his deposition, re-

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[1] The Public Defender did not represent respondent in the civil forfeiture proceeding.

[2] Since the trial transcript of respondent's testimony was not marked with a volume number, citations to his testimony before the district court will be as follows: "Straub, Tr. ——." Other citations to the transcript will refer to the specific volume and page numbers.

spondent revealed that prior to the robbery he was receiving G.I. Bill benefits of $422 or $511 per month. *Id.* at 52. Respondent's bank records show that he had $1375 on deposit with the Life Savings and Loan of Clearwater on the day of his arrest and made deposits totalling $2190 during one of the months preceding his arrest. *Id.* at 48, 84. Finally, during the course of his incarceration, respondent saved $3000 and also purchased a $2100 car for his wife. *Id.* at 97.

While incarcerated in the Sarasota County Jail, respondent asked to use a law library. He indicated that he wanted to assist his Public Defender in the defense of his criminal case and wanted to prepare a defense to the civil forfeiture action.[3] Because the Sarasota County Jail had no law library, inmates were required to obtain a court order to allow them to be taken from the jail to the county law library. I Tr. 24. Respondent's attorney in the criminal case moved for such a court order. I Tr. 101, 109-10. In addition, during a hearing in the civil forfeiture case, respondent requested to use the law library. Straub, Tr. 27. The state court apparently did not rule on those requests and neither respondent nor his counsel renewed the requests. App., *infra*, 2a-3a. At a subsequent trial which respondent attended, his car was ordered forfeited to the State of Florida by the court.

2. The present action arises from consolidated cases respondent brought in the United States District Court for the Middle District of Florida against petitioners. Respondent claimed damages under 42 U.S.C. § 1983 for the alleged violation of his right of access to the courts

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[3] Respondent's Public Defender was not able to represent him in the civil forfeiture proceeding. I Tr. 92-93. The Public Defender did refer respondent to private attorneys who were willing to consider taking the case with a long-term payment arrangement. I Tr. 93. Respondent chose, however, to represent himself.

mandated by this Court's decision in *Bounds v. Smith*, 430 U.S. 817 (1977). First, he alleged denial of access to a law library to aid his Public Defender and second, he claimed denial of access to a law library to prepare a defense to the civil forfeiture proceeding. Respondent was initially allowed to proceed *in forma pauperis* in the district court. But, upon learning of respondent's financial resources, the district court revoked his *in forma pauperis* status. Order, October 1, 1985. At the trial of his Section 1983 action, respondent was represented by retained counsel.

After trial, the district court concluded that respondent had been denied his right of access to the courts in his civil forfeiture proceeding.[4] Notwithstanding its own decision to deny respondent *in forma pauperis* status, Order, October 1, 1985, the court found that he was indigent, relying solely on the state court's appointment of a Public Defender and stating that "the defense has not shown that [respondent] lied to the State court judge or even that that judge was unaware of his income." App., *infra*, 24a.[5] The court found respondent indigent

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[4] Since respondent was represented by counsel in his criminal case, the district court held that he was not denied his right of access to the courts in that proceeding. App., *infra*, 21a-22a.

[5] Notwithstanding the district court's statement, it *was* clear that the affidavit of insolvency filed with the State court was false. Respondent simply lied to the court through the affidavit, filed pursuant to § 27.52(1) of the Florida Statutes ("Any accused person claiming indigency shall file with the court an affidavit which shall contain the factual information required in subsection (2)."). Respondent signed an affidavit indicating that he had no income or assets. Straub, Tr., at 88-90. The Florida Statutes, in pertinent part, provide that if a "defendant owns cash in excess of $500," or if the defendant's "gross income exceeds $100 per week plus $20 per week for each of the first two dependents of the defendant and $10 per week for each additional dependent" then there should be a "presumption that the defendant is not indigent." Fla. Stat. § 27.52(2)(b) (1985). The court may, as the district court noted (App., *infra*, 24a), consider other factors. Fla. Stat.

even though it noted that respondent "was not the most credible of witnesses on the issue of his income." App., *infra*, 24a.

The district court also ruled that, even if its indigency determination were incorrect, it would nonetheless hold that respondent was constitutionally entitled to access to a law library. The court rejected the defendants' argument that *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976), conditioned the state's constitutional burden of accommodating a prisoner's right of access to the courts (*i.e.*, access to a law library or other legal assistance) on a factually supportable finding that the prisoner is indigent. The court reasoned that such a rule is contrary to *Bounds v. Smith*, *supra*, that the pertinent discussion in *Wilson* was mere dictum and that petitioners' proposed rule would be unworkable. Accordingly, respondent was awarded $3,000 in damages and attorney's fees. App., *infra*, 25a-26a.

The court of appeals affirmed. App., *infra*, 1a-17a. Despite the clear and uncontroverted evidence to the contrary, the court of appeals held first that the ruling below—that respondent was indigent—was not clearly erroneous. App., *infra*, 4a. In the alternative, the court announced that "even if [respondent] were not indigent, he was still entitled to access to the courts through the use of a library or other legal materials furnished by the county." App., *infra*, 5a. The court of appeals reasoned:

> The state cannot force a person with financial means, who would otherwise not hire a lawyer, to hire a lawyer because of incarceration, any more than the state can deny access to an indigent.

App., *infra*, 5a.

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§ 27.52(2)(c) (1985). Nevertheless, it is clear that, absent petitioner's false affidavit, the state court should not have appointed counsel for him.

The court held that *Bounds* placed an "affirmative obligation" upon the states to insure inmates meaningful access to the courts through provision of legal research materials and "establish[ed] no exception for nonindigent inmates." App., *infra*, 7a. Thus, all prisoners within the jurisdiction of the Eleventh Circuit must be afforded "access to the courts"—including access to a law library or "adequate assistance from individuals trained in the law"—regardless of their wealth and their ability to obtain access through attorneys. App., *infra*, 6a, quoting *Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986). The court of appeals also held that this "right" extends to civil proceedings, such as the forfeiture action against respondent's automobile. App., *infra*, 7a-8a.

Judge Hill concurred, but he argued that the court should have rested its decision solely on the issue of Straub's indigency.[6] Judge Hill claimed that the majority impermissibly read *Bounds* as giving a *non-indigent* prisoner the choice of whether to hire an attorney or proceed *pro se* at the states' expense. According to Judge Hill, the *Bounds* decision's guarantee of "access to the courts" is more appropriately viewed as "an equalizer." App., *infra*, 11a.

> [*Bounds*] requires that access be given where none was available. This does not mean, necessarily, that a prisoner with ample financial resources to retain a lawyer has insufficient access to the courts unless he or she also has access to a law library. The state may not have to provide everyone sued or indicted with a full set of law books in case he or she might wish to proceed *pro se*.

App., *infra*, 11a-12a.

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[6] Judge Hill specifically noted that the majority's holding that all prisoners are entitled to access for all civil actions was not "harmless dicta" but rather an expansion of the *Bounds* holding "in two important ways, neither of which is justified by the facts of this case." App., *infra*, 9a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit in this case has expanded significantly the federally imposed burden on state and local governments to provide inmates with access to a law library if they are in custody in Florida, Georgia or Alabama.[7] That court has now held that, as a matter of constitutional right, all state prisoners—regardless of wealth or adequacy of representation—are entitled to access to law libraries and other materials in all litigation in which those inmates are involved.[8] This ruling is inconsistent with the precedents of this Court, is in conflict

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[7] Although the court of appeals did not overturn the district court's clearly erroneous finding that respondent was indigent, the court of appeals' broad "alternative" holding clearly is not mere dicta. The court unequivocally held that a prisoner with financial means must be provided with some form of legal assistance if he chooses not to employ counsel. App., *infra*, 5a-6a. Moreover, the court's use of the alternative holding as a basis for announcing a broad rule of general applicability should not be insulated from further review in this case. It is clear that respondent was *not* indigent at the time he was denied access. If the Court had properly addressed the issue, instead of merely asserting that the ruling of the district court was not "clearly erroneous," then it would have been required to consider the broader issue. Thus, although the "clearly erroneous" determination obviously is not by itself worthy of review by this Court, it should not be an obstacle to review of the fundamentally important ruling on the alternative issue decided in this case.

[8] For smaller state and local prisons the burden of the ruling below will be manifestly onerous. State and local governments must either incur the expense of establishing a law library or face the expense, administrative inconvenience, and possible threat to the public safety of taking prisoners to law libraries outside the prison. Thus, it is important that this Court decide whether this burden is constitutionally mandated for non-indigent prisoners in all civil cases. Indeed, Sarasota County presently is faced with an order to pay the legal fees of a non-indigent who did not obtain counsel even though the trial court found he had $40,000-$50,000 dollars available in an I.R.A. *State of Florida v. Haskell*, No. 86-0830-CF-A-N1 (12th Jud. Cir. March 4, 1987) (order requiring payment of defense fees).

with the position of at least four other courts of appeals and imposes an unnecessary security risk and financial burden on state and local governments.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

In *Bounds v. Smith*, 430 U.S. 817 (1977), this Court affirmed an order requiring "the responsible State officials to submit a proposed plan for implementing the State's obligation to provide adequate library facilities for the use of *indigent prisoners* seeking to file *pro se habeas* or *civil rights* actions. . . ." *Smith v. Bounds*, 538 F.2d 541, 542 (4th Cir. 1975), *aff'd*, 430 U.S. 817 (1977) (emphasis added). *Bounds* reaffirmed the long-standing principle, which is recognized and respected by the petitioners, that inmate access to the courts must be "adequate, effective, and meaningful." 430 U.S. at 822.[9] In particular, *Bounds* held that the central inquiry in determining whether the law library in question was necessary to ensure adequate access was "whether law libraries . . . are *needed* to give prisoners a *reasonably adequate opportunity* to present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825 (emphasis added).

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[9] This does not mean that indigents are entitled to the full range of resources that would otherwise be available to a prisoner with resources. As this Court stated in *Ross v. Moffitt*, 417 U.S. 600, 616 (1974):

> [T]he fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Thus, even indigents need not be provided with counsel for pursuit of discretionary review of a criminal conviction.

Bounds and its predecessors impose an added burden on state penal systems only because of this Court's legitimate desire to ensure that indigent prisoners have minimally adequate access to the courts.[10] Obviously, a non-indigent inmate with access to a lawyer has a "reasonably adequate opportunity" to present his case to the court in a *habeas* petition, a civil rights action or a civil forfeiture action.

The court of appeals simply ignored the fact that the "right of access" defined by this Court is inextricably tied to a concern with providing "reasonably adequate" legal services to *indigent* inmates. By ignoring the central premise of the right of access, the court of appeals has undermined completely the limiting principle of the *Bounds* decision, thereby leaving local governments virtually defenseless against inmate demands for legal assistance.[11] This Court should grant this petition in order to consider whether the right of access defined in *Bounds*

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[10] This Court recently noted that "denial of counsel to indigents on first appeal as of right amounted to unconstitutional discrimination *against the poor*." *Pennsylvania v. Finley*, U.S. 107 S. Ct. 1990, 1993 (1987) (emphasis added).

[11] The Eleventh Circuit's ruling also ignores the deference due to state and local officials who are charged with administering prisons. "Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974); *Block v. Rutherford*, 468 U.S. 576, 584-585 (1984). Indeed, state and local prisons "are subject to federal authority only where paramount federal constitutional or statutory rights supervene." *Johnson v. Avery*, 393 U.S. 483, 486 (1969). Even when those rights do supervene, courts give state and local officials latitude in fashioning a remedy. Thus, in *Bounds*, this Court noted that "a legal access program need not include any particular element we have discussed, and we encourage local experimentation." *Bounds*, 430 U.S. at 832.

The decision below, however, essentially holds that while the State may experiment, the prisoner decides. Any prisoner who elects not to employ counsel, certainly the most effective means of access to a court, may then demand a library or other "legal assistance" at the state's expense.

limits a non-indigent inmate's right to proceed *pro se* at the state's expense.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision below is in conflict with decisions in the courts of appeals in at least four other circuits. The Eleventh Circuit has held that the state cannot force an incarcerated individual to hire a lawyer "any more than the state can deny access to an indigent." App., *infra*, 5a. As Judge Hill noted in his concurring opinion, this decision "flatly overrule[d] *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976)" which held that "[t]he state is under no duty to provide [prisoners] with legal materials at public expense" when they can afford counsel. 534 F.2d at 57.[12] In departing from *Wilson*, the Eleventh Circuit has thus placed itself in direct conflict with the Fifth Circuit.

The decision below also conflicts with the Fourth Circuit which has held that "we do not read *Bounds* to give an option to the *prisoner* as to the form in which he elects to obtain legal assistance." *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978), *cert. denied*, 482 U.S. 911 (1979). In *Chatman*, an indigent defendant was offered—but declined—assistance of counsel at his trial. The court in *Chatman* declined to interpret *Bounds* to require the States to provide the defendant with access to a library after he had refused the assistance of counsel. The court stated that "to the extent . . . *Bounds* has any application to the instant case, the United States satisfied its obligation under the sixth amendment when it offered defendant the assistance of counsel which he declined." *Id.*; *see also Williams v. Leeke*, 584 F.2d 1336 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979)

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[12] The Eleventh Circuit adopted Fifth Circuit law as it existed on September 30, 1981 as binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

(states free to satisfy obligation under *Bounds* in a variety of ways). Thus, while a prisoner in the Fourth Circuit may elect to proceed *pro se*, the government is under no obligation to provide him with legal assistance, if he so selects.

The Ninth Circuit followed the Fourth Circuit's analysis in *United States v. Wilson*, 690 F.2d 1267, 1272 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983). In *Wilson*, the prisoner argued that the right of access under *Bounds*, combined with the right to proceed *pro se* under *Faretta v. California*, 422 U.S. 806 (1975), required that he be provided access to a law library to prepare a "meaningful" *pro se* defense. The Ninth Circuit rejected that contention and held that "[t]he offer of court-appointed counsel to represent Wilson satisfied the Fifth Amendment obligation to provide meaningful access to the courts." *United States v. Wilson, supra*, at 1272. The court noted that access to a law library is only one permissible means of obtaining meaningful access to the court. Access to the assistance of an attorney is also a permissible means of satisfying *Bounds*. Thus, "[w]hen such adequate access is provided, as was here, an inmate may not reject the method provided and insist on an avenue of his or her choosing." *Id.* at 1271, citing *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981) (access to libraries is merely one of a number of means of satisfying *Bounds*).

Similarly, the Seventh Circuit, in *United States ex rel. George v. Lane*, 718 F.2d 226, 227 (7th Cir. 1983), held that if a pretrial detainee "is offered the assistance of appointed counsel and refuses the same, no constitutional right exists mandating that the prisoner in the alternative be provided access to a law library." In *Lane*, a prisoner had vacillated about whether to defend himself *pro se* or through appointed or private counsel. At the start of the trial he finally accepted counsel, but that attorney later became ill. Rather than accept another attorney, the defendant then elected to proceed *pro se*.

Following his conviction the defendant complained that he was denied access to a law library. After quoting from *United States v. Wilson, supra,* the court held:

> We agree with the Ninth Circuit and hold that the offer of court-appointed counsel to represent a defendant satisfies the constitutional obligation of a state to provide a defendant with legal assistance under the Sixth and Fourteenth Amendments.

United States ex. rel. George v. Lane, 718 F.2d at 231. Thus, "[a] state is not required . . . to offer a defendant law library access once it has fulfilled its constitutional obligation to provide him with competent legal assistance." *Id.* at 233; *Corgain v. Miller,* 708 F.2d 1241, 1250 (7th Cir. 1983) (refusing to read *Bounds* "as imposing a duty to provide [prisoners] with state law libraries [to research *habeas* claims] in the event that they chose not to accept adequate alternative services"); *Gometz v. Henman,* 807 F.2d 113, 116 (7th Cir. 1986) ("A prisoner with a lawyer on call may not also insist on assistance from fellow prisoners, for the entitlement is to adequate access, not to maximum possible access").

Thus, the Fourth, Ninth and Seventh Circuits have concluded that—even in a criminal trial—a defendant is not entitled to access to a law library or other assistance if counsel is made available to assist the defendant. If the defendant decides not to accept the offer of assistance of counsel, the government is under no obligation to provide additional or alternative methods of access to the courts.[13] Moreover, the Fifth Circuit clearly has held that an inmate who is not indigent is not entitled to

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[13] The Second Circuit reached a similar result in *Spates v. Manson,* 644 F.2d 80 (2nd Cir. 1981), with respect to criminal appeals. There the court held that while there is a right to proceed *pro se,* "this right does not carry with it a right to state-financed library resources where state-financed legal assistance is available." *Id.* at 85 (footnote omitted). Thus, a prisoner preparing his appeal may not insist on access to library materials.

have the state provide him with "legal materials at public expense." *Wilson*, 534 F.2d at 57. The necessary implication of these decisions is that an inmate who has the resources with which to employ counsel and thereby obtain fully adequate access to the courts has no right to forgo that option and insist on satisfying his right by proceeding *pro se* with access to a law library provided at state expense.

The opinion below is doubly worthy of review because, as Judge Hill noted in his concurrence, the majority "cavalierly expands the types of legal problems" for which an inmate may insist on state-supplied access to the courts. App., *infra*, 12A. Under the decision below, a non-indigent inmate may insist on access to a law library to pursue *any* civil claim. This holding extends the "right of access" far beyond the limits of the constitutional, civil rights and *habeas corpus* actions on which this Court focused in *Bounds*. See *Bounds*, 430 U.S. at 825, 827 (issue decided is whether inmates entitled to assistance in obtaining "adequate opportunity to present claimed violations of fundamental constitutional rights to the courts").

By extending the "right of access" to all civil cases, the court below overlooked the fact that the right has generally been applied only in those cases addressing the legality or conditions of confinement. *See, e.g., Nordgren* v. *Milliken*, 762 F.2d 851, 855 (10th Cir.), *cert. denied*, 106 S. Ct. 593 (1985); *In re Green*, 669 F.2d 779, 785 (D.C. Cir. 1981); *Crocker* v. *Mulligan*, 788 F.2d 809, 813 (1st Cir. 1986). The Eleventh Circuit, in effect, now requires state and local governments to provide litigation assistance to any non-indigent inmate who prefers to conduct his own civil litigation. The very existence of this right will almost certainly encourage some inmates to become more litigious.

Thus, the Eleventh Circuit has rejected the basic reasoning of the decisions of four courts of appeals on an

issue of tremendous practical importance to state and local governments. According to the decision below, the availability of counsel to a non-indigent does not satisfy the state's obligation to assure that inmates have a "reasonably adequate opportunity" to present their claims in court. Giving the decision a dictum label cannot change the fact that Florida, Georgia and Alabama (and every city and county in those States) must be ready to take on the burden of assisting non-indigent prisoners in *all types of legal proceedings*. Nor is this analysis changed by the fact that there are two alternative grounds for the holding, one of which is not worthy of this Court's review. The sole basis for the alternative ground was respondent's assumed indigency. Yet, respondent was not indigent, either at the time of his state criminal trial or his Section 1983 proceeding. A federal court should not be permitted to insulate its errors from this Court's review by refusing to ascertain the readily ascertainable fact that the respondent is not indigent. Had the Eleventh Circuit done its job in this respect there would be only one ground for its holding and that ground is clearly worthy of review by this Court.

This Court should grant this petition to resolve the conflict concerning when the Constitution requires inmates to be provided additional assistance in achieving access to the courts *beyond* the availability of counsel.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

RICHARD E. NELSON
NELSON, HESSE, CYRIL,
SMITH, WIDMAN & HERB
2070 Ringling Boulevard
Sarasota, FL 34237
(813) 366-7550

Counsel for Petitioners

* Counsel of Record

September 2, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 86-3312

MICHAEL DENNIS STRAUB,
Plaintiff-Appellee,

v.

GEOFFREY MONGE,
as Sheriff of Sarasota County, Florida,
Defendant-Appellant.

MICHAEL DENNIS STRAUB,
Plaintiff-Appellee,

v.

THE CHAIRPERSON OF THE SARASOTA BOARD OF COMMISSIONERS, JIM HARDCASTLE, the Sheriff of Sarasota County, FL, *et al.*,
Defendants-Appellants.

May 5, 1987

Nelson Hesse, Cyril Smith, Widman & Herb, Richard E. Nelson, F. Steven Herb, Karen E. Atkins, Sarasota, Fla., for defendant-appellant.

Rahdert, Anderson & Richardson, George K. Rahdert, St. Petersburg, Fla., M. David Shapiro, Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL and HATCHETT, Circuit Judges, HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge:

This case requires that we determine the scope of *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). Finding that the district court correctly applied *Bounds*, we affirm.

On March 5, 1982, law enforcement officials in Sarasota County, Florida, arrested Michael Dennis Straub for robbery of the First Federal Bank of Fort Meyers, Florida. Following his arrest, criminal charges were filed against him, and he was incarcerated in the Sarasota County Jail where he remained until his transfer to the Florida State Prison system in September, 1982. Because Straub had used his automobile in the bank robbery, a felony, the state of Florida began civil forfeiture proceedings against the automobile.[1]

In the criminal case, the state trial court found Straub indigent and appointed the public defender for Sarasota County to represent him on the criminal charges. As to the civil forfeiture matter, because Florida law prohibited representation by the public defender, he had no lawyer. During a hearing in the civil forfeiture case, Straub requested permission to use the county law library. For some unknown reason, the state trial court never ruled on Straub's request to use the law library.

While incarcerated in the Sarasota County Jail, Straub continued his efforts to get access to legal materials in

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[1] Straub was personally named as a defendant in the civil forfeiture proceedings.

order to assist his lawyer in the criminal case and to prepare to defend himself and his automobile in the civil forfeiture case. Jail officials told Straub that he would have to obtain a court order to gain access to a law library. The record further indicates that Straub attempted to have written requests for access to a library filed with the court in order to obtain such a court order but for unknown reasons, these written requests never reached the court. Eventually, Straub entered a nolo contendere plea to the robbery charge which resulted in a judgment of guilty and a sentence of incarceration. The automobile was forfeited to the state of Florida.

PROCEEDINGS

Straub filed two cases in the district court pursuant to 42 U.S.C. § 1983, seeking damages, injunctive relief, and attorney's fees.[2] In both actions, Straub alleged that Sarasota County officials had denied him access to the courts in violation of his right to due process of law as provided by the fourteenth amendment to the Constitution of the United States.

The county officials contend that Straub had no constitutional right to access to a law library or legal materials in the criminal case because his appointed counsel provided him with meaningful access to the courts. As to the civil forfeiture case, the county officials contend that Straub was not denied access to the courts because he could have obtained a court order which would have provided him with the right to visit the county law library. The county officials also contend that Straub was not indigent; therefore, he could have hired a lawyer. Some effort was made in the district court to show that

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[2] In the first case, the defendants were Sheriff Jim Hardcastle and the state of Florida. The state of Florida was dismissed. In the second case, the defendants are Sheriff Jim Hardcastle, Max Frimberger, Captain of Sarasota County Jail, and the chairperson of the Sarasota County Board of County Commissioners.

certain inmates simply should not be allowed to use libraries.

The district court held that the policy requiring inmates to obtain a court order to gain access to legal materials was unconstitutional because the procedure itself required litigation. The district court characterized the county's procedure as "an unreasonable and unjustifiable catch-22 position of having to have access to the courts in order to obtain the legal materials necessary to show [an inmate] how to get access to the courts." As to the county's assertion that some detainees should not be allowed in a public library, the district court held that the burden should be on the county to obtain a court order preventing undesirable inmates from use of the library, rather than placing the burden on the inmates of seeking the court order. Rejecting all of the county officials' contentions, after a trial, the district court entered judgment for Straub in the amount of $3,000 plus costs and attorney's fees.

In this court, the county officials seek reversal of the district court's order arguing that Straub was not indigent and even if indigent, the county officials have qualified immunity foreclosing an award of damages.

DISCUSSION

After a full hearing, the district court found, as did the state court, that during Straub's detention in the Sarasota County Jail, he was indigent.[3] We may not disturb this factual finding unless the record indicates that the district court was clearly erroneous. *United States v. Koziy*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835, 105 S.Ct. 130, 83 L.Ed.2d 70 (1984). The district court was not clearly erroneous. Consequently, if Straub is indigent, and if a court order is required to seek a court order, then, obviously, Straub has been denied

[3] The state trial court found Straub indigent in the criminal case.

access to the courts. We could stop. We go on because the district court ruled that even if Straub were not indigent, he was still entitled to access to the courts through the use of a library or other legal materials furnished by the county.

The county officials rely on *Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976), in which the Fifth Circuit asked: "If a state prison inmate is not an indigent, if he has adequate financial resources with which to employ counsel of his own choice, is the state under a constitutional obligation to furnish the inmate with legal research material?" The Fifth Circuit answered that question in the negative. That was in 1976. In 1977, the United States Supreme Court decided *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). *Bounds* held that the fundamental right of access to the courts requires that prison authorities assist inmates in the preparation and filing of meaningful legal papers by providing adequate libraries or adequate assistance from persons trained in the law. In this case, the county officials misinterpret *Bounds* as applying only to indigent inmates. A reading of *Bounds* is sufficient: "[O]ur decisions have consistently required States to shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824, 97 S.Ct. at 1496 (emphasis added); *see also Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985). This statement, alone, explicitly rejects the contentions urged by the county officials. For sure the access issue has often arisen in situations where the inmates were indigent. The indigent will continue to be the most affected. But, as this case indicates, policies regarding library access may seriously affect an inmate who is not indigent. The state cannot force a person with financial means, who would otherwise not hire a lawyer, to hire a lawyer because of incarceration, any more than the state can deny access to an indigent. We hasten to add that

we are not holding that an inmate with the financial means to hire a lawyer must be furnished a lawyer at state expense. We do not now speak of representation, but access. The state may not bar access to the courts no matter what form it utilizes.

"Under *Bounds*, the government is *obligated* to provide prisoners "with adequate legal libraries or adequate assistance from persons trained in the law.'" *Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986) (quoting *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498) (emphasis added). "The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. . . . Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S.Ct. 1800, 1814, 40 L.E.2d 224 (1974). "Of what avail is it to the individual to arm him with a panopoly of constitutional rights if, when he seeks to vindicate them, the courtroom can be hermetically sealed against him by a functionary who, by refusal or neglect impedes the filing of his papers?" *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) (quoting *McCray v. Maryland*, 456 F.2d 1, 6 (4th Cir. 1972)). *See also Harris v. Pate*, 440 F.2d 315, 317 (7th Cir. 1971) (prison authorities prohibited from interfering with right of access to courts).[4] "[T]he State owes to each individual

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[4] Moreover, Florida law recognizes the affirmative duty placed on the state to provide affirmative assistance to inmates in their efforts to acquire meaningful access to the courts:

> All citizens in our state are also guaranteed access to our courts by article 1, section 21, Florida Constitution (1968). Although it is not necessary for us to provide affirmative assistance in order to ensure meaningful access to the courts to our citizens, as *it is necessary for us to do for those incar-*

that process which, in light of the values of a free society, can be characterized as due." *Boddie v. State of Connecticut*, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971).

Bounds imposes an affirmative obligation upon the states to insure that "all prisoners" receive meaningful access to the courts and establishes no exception for non-indigent inmates. "[T]he right to a meaningful opportunity to be heard . . . must be protected against denial by particular laws [and policies] that operate to jeopardize it for particular individuals." *Boddie*, 401 U.S. at 379-80, 91 S.Ct. at 786-87. In *Cruz vI Hauck*, 627 F.2d 710 (5th Cir. 1980), the appellate court required the district court to determine whether *all* inmates at the jail had adequate access to the courts. *See also, Hooten v. Jenne, III*, 786 F.2d 692 (5th Cir. 1986). *Cruz* held that all inmates must in fact have access to the courts as mandated by *Bounds*. 627 F.2d at 721. "All prisoners . . . have court enforced access to legal research materials or assistance from persons trained in the law." *Hawthorne v. Wells*, 761 F.2d 1514, 1516 (11th Cir. 1985) (noting *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498).

We also note that the right to meaningful access to the courts, although routinely presented in constitutional and civil rights actions, is likewise applicable to the civil forfeiture action against Straub. Recently, the Fifth Circuit, in *Jackson v. Procunier*, 789 F.2d 307, 311 (5th Cir. 1986), rejected the proposition that "a prisoner's right of 'adequate, effective, and meaningful' access to the courts, as recognized by the Supreme Court in *Bounds*

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cerated in our state prison system, Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977), we should not place any unnecessary restrictions upon that right.

The Florida Bar v. Brumbaugh, 355 So.2d 1186, 1192 (Fla. 1978) (emphasis added).

v. Smith, [footnote omitted] is limited to the presentation of constitutional, civil rights, and habeas corpus claims." The court held that "[r]ecognition of the constitutional right of access to the courts . . . long precedes *Bounds*, and has from its inception been applied to civil as well as constitutional claims." *Jackson*, 789 F.2d at 311.[5]

We agree with the district court's ruling regarding immunity. The right in this case is well established.

Accordingly, the district court order is affirmed.

AFFIRMED.

HILL, Circuit Judge, specially concurring:

Once we determined that the district court's determination of indigency was not clearly erroneous, we needed only to decide whether an indigent inmate, faced with defending himself in a civil forfeiture action brought by the state, who is not assisted by counsel in that defense, may be required to seek a court order before being allowed to use a law library. Because the majority opinion responds negatively to that query, I do not dissent. However, I am unable to concur in the majority's opinion.

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[5] The court in *Jackson* recalled that

> in *Chambers v. Baltimore & Ohio Railroad Co.*, [footnote omitted] the Supreme Court recognized this right of access in the context of a diversity tort suit, founding the right on the privileges and immunities clause, and stating: The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . granted and protected by the federal constitution.' [Footnote omitted.]

Jackson, 789 F.2d at 311 (quoting *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 52 L.Ed. 143 (1907)).

By addressing the issue of access to non-indigents, in a case where the prisoner was found indigent, the majority unnecessarily expands the holding of this case. The district court supported its opinion on alternative grounds out of an abundance of caution. Had we found the finding of indigency clearly erroneous, it would have been necessary to address the alternative holding. We did not so find, thus our task is finished. We need not address issues based on a hypothetical situation.

I would like to dismiss the second part of the majority opinion as harmless dicta. However, the majority does not treat it as such, and I am concerned that it will not be read as such. Thus, I feel compelled to write separately, and point out that the majority expands *Bounds'* holding in two important ways, neither of which is justified by the facts of this case.

First, the majority flatly overrules *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976). It claims that this action is required by a simple reading of *Bounds*. I do not find the issue so clear. It is true that *Bounds*, and subsequent decisions in the circuit courts, have required that the states "assure *all* prisoners meaningful access to the courts." *Bounds*, 430 U.S. at 824, 97 S.Ct. at 1496 (emphasis added). *See also Hawthorne v. Wells*, 761 F.2d 1514 (11th Cir. 1985); *Cruz v. Hauck*, 627 F.2d 710 (5th Cir. 1980). However, when the majority states, "the state cannot force a person with financial means, who would otherwise not hire a lawyer, to hire a lawyer because of incarceration, any more than the state can deny access to an indigent," it breaks new ground. This proposition does not relate to the words "all prisoners." In truth, it redefines "meaningful access." According to the majority opinion, not only must a prisoner have access to the courts, he must also have the choice between hiring an attorney and proceeding *pro se*—the latter at state expense.

The economic and logistical problems imposed by the majority's expansion of *Bounds* should not be taken lightly. While it may not be difficult for a federal prison with a large library to provide all inmates with access to it, many state-run jails, such as the one that confined Mr. Straub, are not equipped with such facilities. Under the majority view, state authorities must either finance a complete library or surmount the logistical and security related problems of transporting inmates to public libraries.

These considerations have been taken into account by other federal courts when limiting *Bounds'* impact in a slightly different context. At least three circuit courts have held that where an indigent criminal defendant refuses court-appointed counsel, the state does not have an obligation to give him access to a law library so that he may proceed *pro se*. In so holding, the Fourth Circuit Court of Appeals explained, "We do not read *Bounds* to give an option to the *prisoner* as to the form in which he elects to obtain legal assistance." *United States v. Chatman*, 584 F.2d 1358 (4th Cir. 1978) (emphasis in original). *See also United States ex rel. George v. Lane*, 718 F.2d 226 (7th Cir. 1983); *United States v. Wilson*, 690 F.2d 1267 (9th Cir. 1982); *cf. Hooks v. Wainwright*, 775 F.2d 1433 (11th Cir. 1985) (*Bounds* does not require that the state provide both access to a law library and assistance from "persons trained in the law").

The question here is also whether "meaningful access" means that the state must bear the burden of an incarcerated inmate's "choice" to proceed *pro se*. Allowing economics into the equation is not an impermissible step. The Supreme Court in *Bounds* was careful to note:

> This is not to say the economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its

> total denial. Thus, neither the availability of jailhouse lawyers nor the necessity for affirmative state action is dispositive of respondents' claims. The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.

With this in mind, I submit that "meaningful access" need not be interpreted as broadly as the majority suggests. In fact, *Bounds* may be interpreted to mean that states are required to fill in the gaps, and provide access to those prisoners who would otherwise not have access, thus making sure that "all" prisoners do have access. Such an interpretation of *Bounds* is not as implausible as the majority opinion implies. As we noted in *Hooks v. Wainwright*:

> *Bounds* was a limited decision. At the time it was decided, *Bounds* was the culmination of a series of cases holding that imprisonment should not deprive persons of access to courts. . . .
>
> All of these decisions simply removed barriers to court access that imprisonment or indigency erected. They in effect tended to place prisoners in the same position as nonprisoners and indigent prisoners in the same position as nonindigent prisoners. Having held that inmates can represent themselves, if able to do so, and can help other inmates who are not so able, it was but a small step to hold that such able inmates, who presumably would have access to libraries but for imprisonment, must be given access to libraries or prison, or access to people who have access to libraries.

Id., 775 F.2d at 1436.

The Supreme Court decision in *Bounds*, then, may be seen as an equalizer. It requires that access be given

where none was available. This does not mean, necessarily, that a prisoner with ample financial resources to retain a lawyer has insufficient access to the courts unless he or she also has access to a law library. The state may not yet have to provide everyone sued or indicted with a full set of law books in case he or she might wish to proceed *pro se*.[1] The simple fact is that the *Bounds* court did not address the indigency issue, and neither should we, until we are presented with a case which contains the necessary factual predicate for overruling *Wilson*.

Second, I object to the majority's opinion because it cavalierly expands the types of legal problems for which access to court system [sic] must be available. In *Bounds*, and every prior Supreme Court case regarding court access, the court only struck down those barriers which kept indigent prisoners from filing habeas corpus petitions, suits challenging the conditions of their confinement, or civil rights claims.[2] In the *Bounds* opinion

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[1] Some restrictions on access to the court system are impermissible even though the affected prisoner already has an attorney. For example, in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), the Supreme Court struck down a California regulation barring law students and paralegals, who were employed by the inmates' attorneys, from visiting the prisoners. A regulation inhibiting private legal counsel from effectively assisting prisoners varries very little justification. However, invalidating such an unjustified restriction is a far cry from requiring that the state provide all inmates with a library in all instances.

[2] In *Ex parte Hull*, 312 U.S. 546, 549, 61 S.Ct. 640, 641, 85 L.Ed. 1034 (1941), the court struck down a regulation prohibiting the filing of habeas corpus petitions until the parole boards "legal investigator" had determined that they were "properly drawn." In *Griffin v. Illinois*, 351 U.S. 12, 16-20, 76 S.Ct. 585, 580-591, 100 L.Ed. 891 (1956), the court held that trial records must be provided to inmates unable to pay for them. *Burns v. Ohio*, 360 U.S. 252, 257-58, 79 S.Ct. 1164, 1168, 3 L.Ed.2d 1209 (1959), held that indigent prisoners must be permitted to file appeals in habeas corpus petitions without paying docket fees. *Johnson v. Avery*, 393 U.S. 483, 490, 89 S.Ct. 747, 751, 21 L.Ed.2d 718 (1969), invalidated prison regulations which prohibited inmates from assist-

itself, the Supreme Court noted that the right to access cases focus mainly on constitutional and civil rights claims. The court stated:

> [I]n this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues. As this court has "constantly emphasized," habeas corpus and civil rights actions are of "fundamental importance . . . in our constitutional scheme" because they directly protect our most valued rights. (citations omitted).

Bounds, 430 U.S. at 827, 97 S.Ct. at 1498.

The former Fifth Circuit was never asked to apply *Bounds* outside this narrow range of cases.[3] In *Cruz v.*

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ing one another with habeas corpus petitions. In *Younger v. Gilmore*, the Supreme Court affirmed a three-judge district court opinion invalidating California prison regulation which restricted prisoners' access to legal books. However, this case also arose in the context of allowing inmates to draft habeas petitions and civil rights claims. *Gilmore v. Lynch*, 319 F.Supp. 105, 110 (N.D.Cal. 1970), *aff'd sub nom., Younger v. Gilmore*, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971) (per curiam). In *Wolff v. McDonnell*, 418 U.S. 539, 578-80, 94 S.Ct. 2963, 2985-86, 41 L.Ed.2d 935 (1974), the Supreme Court extended *Johnson v. Avery* to civil rights actions, holding that prisoners must be allowed to assist each other in drafting civil rights complaints, as well as habeas petitions.

[3] The former Fifth Circuit did address the issue in a few pre-*Bounds* decisions. In one, *Andrade v. Hauck*, 452 F.2d 1071, 1072 (5th Cir. 1971), we held that "every prisoner has a constitutional right of access to the courts to present any complaint that he might have concerning his confinement." The court did not attempt to define the parameters of meaningful access. In another decision, handed down one week before *Bounds*, we concluded that prisoners must be allowed to render each other assistance in legal matters "including but not limited to divorce, and small civil claims." *Corpus v. Estelle*, 551 F.2d 68, 70 (1977). Although *Corpus* did apply the "meaningful access" concept to the civil arena, neither

Hauck, 627 F.2d 710, 721 (5th Cir. 1982), the former Fifth Circuit cited *Bounds* for the proposition that all inmates must have access to the courts for the filing of "federal habeas corpus or state or federal civil rights actions." (citing *Bounds* at n. 17). In *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981), this court similarly noted:

> "prisoners have a constitutional right to 'adequate, effective and meaningful' access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 822 [97 S.Ct. 1491, 1495, 52 L.Ed.2d 72] (1977) [additional citations omitted]. This right is well established both in habeas corpus actions . . . and in civil rights cases. . . ." [Additional citations omitted].

Id. 661 F.2d at 1212. In another recent case, we noted in dicta that many procedural steps have been taken to ensure access to the courts for "the benefit of the prisoner who in a custodial setting has been deprived of a constitutional right." *Hawthorne v. Wells*, 761 F.2d 1514, 1516 (11th Cir. 1985). Indeed, the new Fifth Circuit, in discussing the *Bounds* decision, explained:

> In *Bounds* the court held that prisoners have a constitutional right of adequate, effective and meaningful access to the courts. . . . Apparently, the right is not extended to all legal filings, but applies only to presentation of constitutional claims, such as civil complaints and state and federal habeas petitions. *Id.* [*Bounds*] at 825, 827-28 and n. 17 [97 S.Ct. at 1496, 1497-98 and n. 17].

Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985).[4] To apply *Bounds* outside this context is a bold extension of

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of these cases addressed the extent to which the state must finance inmates' "meaningful access" to the courts.

[4] *See also Hooten v. Jenne*, 786 F.2d 692 (5th Cir. 1986) (applies *Bounds* in civil rights context); and *Mann v. Smith*, 796 F.2d 79

the principles expounded by the Supreme Court in its right to access decisions.

As the majority rightly notes, the New Fifth Circuit recently dismissed *Morrow's* interpretation of *Bounds* as "obiter dicta," and held that "although *Bounds* did not discuss civil suits," the Fifth Circuit would henceforth apply *Bounds* to prisoners involved in civil cases unrelated to their confinement. *Jackson v. Procunier*, 789 F. 2d 307 (5th Cir. 1986). Finding this an admirable step, today the majority adopts the holding of *Procunier* for the Eleventh Circuit. This goes well beyond what is necessary to decide this case.

Some extension of *Bounds* is necessary in order to support the district court's judgment regarding Mr. Straub's right to access to the courts, for his case falls outside the usual *Bounds* context. We are not dealing with a prisoner who wants to draft a civil rights complaint or a habeas petition. Instead, we are dealing with an indigent pretrial detainee who was faced with defending himself in a civil forfeiture action brought by the state. However, we may extend *Bounds* to cover Mr. Straub's situation, without adopting the holding of *Procunier*, by limiting our holding to the facts presented by Mr. Straub's case.

This limited extension of *Bounds* is a smaller step, and is fully justified by the facts of this case and prior prece-

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(5th Cir. 1986) (applies *Bounds* to prisoner's civil rights claim). The panel in *Mann* aptly described the nature of the beast when it stated:

> As we pointed out in *Morrow*, the principles stated in *Bounds* "suffer for lack of internal definition and prove far easier to state than to apply," perhaps because they have no clear textual footing in the Constitution. 768 F.2d at 623. *Bounds* is vague about exactly what kinds of claims by inmates trigger the "right to access" to the courts, how long a person must be detained before the right is triggered, and what level of legal assistance is required to protect the right.

Id. 796 F.2d at 84.

dent. A defendant in a civil forfeiture proceeding and a habeas corpus petitioner (or civil rights complainant challenging the conditions of confinement) both have the state as their adversary. Both must have meaningful access to the court system if they are to protect their interests—liberty or property—from continued harm. The Supreme Court has already held that the exclusionary rule, which normally only relates to criminal matters, must apply in civil forfeiture proceedings. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965). This extra protection was considered necessary because of the quasi-criminal nature of such proceedings. Prisoners who file post-conviction claims for relief are also challenging criminal proceedings. Thus, Mr. Straub's case has much in common with the type of constitutional and civil rights cases that the Supreme Court was concerned with in *Bounds*, an application of the principles espoused therein to Mr. Straub is justified. I do not wish to apply *Bounds* to every conceivable legal problem, whether the inmate is proceeding as a plaintiff or a defendant; I see no limiting factor in the majority opinion.

Of course, in a certain sense, Mr. Straub was guaranteed "access" to court because he was a defendant. In fact, he was being haled into court whether he wanted to be there or not. To this extent his predicament was analytically distinct from that of *pro se* plaintiffs, who are the types of litigants dealt with in the *Bounds* line of cases. Yet, as expressed above, Mr. Straub was faced with the same adversary. *In this type of case*, "meaningful access" must mean the ability to prepare oneself when one cannot afford counsel. Requiring an inmate to obtain a court order before being allowed to use a library, even where he must use a public library, is an impermissible restriction on that right. To the extent the majority so holds, I decline to dissent: but we ought not go further beyond *Bounds*.

I do not intend that my concurrence be read as a prediction of how I would decide the issues discussed above, were they appropriately presented in a case with the necessary factual predicate. I write merely to explain how the majority opinion goes far beyond *Bounds* in two distinct respects, in a situation where we are not called upon to address these issues. The second part of the majority opinion can easily be read to give every prisoner the right to access to a law library for every perceived legal problem, whether or not he can afford legal counsel.[5] In this I cannot concur.

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[5] As we noted in *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977), programs which provide meaningful legal assistance to inmates beyond that which is required by law are to be commended. I object only to the notion that states are required to finance a legal library capable of giving every prisoner "meaningful access to court" for every perceived legal problem, whether or not a given prisoner can afford an attorney.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 82-589-Civ-T-15

MICHAEL DENNIS STRAUB,
Plaintiff,

vs.

GEOFFREY MONGE,
as Sheriff of Sarasota County, Florida,
Defendants.

MICHAEL DENNIS STRAUB,
Plaintiff,

vs.

THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,
Defendants.

CONSOLIDATED

[Filed March 19, 1986]

MEMORANDUM OPINION

These consolidated cases were brought under 42 U.S.C. § 1983 and they came to trial on the claim that the plaintiff was denied meaningful access to the courts while he was a detainee at the Sarasota County Jail, Sarasota,

Florida during the period of March through July, 1982. The complaints were drafted by the plaintiff who represented himself through most of the years of this litigation. Late in the pretrial proceedings the plaintiff found counsel who would represent him at trial and he was represented by counsel at the two-day trial held March 10-11, 1986.

The plaintiff seeks an award of damages for emotional distress and mental anguish associated with the deprivation of a substantive constitutional right and also seeks an award of attorneys fees for the attorneys who brought the case to trial. For the reasons set forth herein the Court concludes that the plaintiff was denied meaningful access to the courts while attempting to defend a forfeiture action during his detention at the Sarasota County Jail and that he has suffered emotional distress and mental anguish as a result of that deprivation.

On March 5, 1982 Michael Dennis Straub, hereinafter "Straub," was arrested for the armed robbery of the North Port Office of the First Federal Bank of Fort Myers, Florida. When Straub was taken into custody the police also took custody of his automobile. Shortly after his arrest the State of Florida instituted its criminal prosecution of Straub and, later, began civil forfeiture proceedings to acquire title to his automobile because it was used in the commission of a felony. The criminal proceedings were styled *State of Florida v. Michael Straub* and the civil forfeiture proceeding, somewhat peculiarly, was styled *State of Florida v. One 1978 Datsun 4-Door Sedan and Michael D. Straub.*

The style of the civil forfeiture was peculiar because a forfeiture proceeding normally is brought in rem and the claimant (i.e., owner, here Straub) is not named as respondent but only enters the litigation if he claims some interest in the property. The inclusion of Straub as a respondent in the civil forfeiture is of interest in this case because as a party, notwithstanding the legitimate

interest Straub would have had in litigating as a claimant, it is reasonable that Straub had an even heightened interest in the civil forfeiture. It also is reasonable to conclude from the evidence that Straub, a lay person untrained in the law, was ignorant of the legal and procedural implications of a civil forfeiture proceeding.

At the time of his detention in the Sarasota County Jail facilities Straub was judicially determined to be indigent and from the time of his initial appearance in the criminal proceedings he was represented by court appointed counsel, The Public Defender for Sarasota County. However, the public defender did not, and in fact was not allowed to, represent or even advise Straub with regard to the separate but related civil forfeiture proceedings.

Prior to his criminal trial Straub was brought to trial on the civil forfeiture action, a proceeding having penal overtones, and in this particular case the same state's attorney was functioning as prosecutor in the criminal proceeding and state's attorney in the civil forfeiture. These are yet further peculiar twists to the facts of this case because many of the same issues that arise in a criminal proceeding can, and often do, arise in the context of the related forfeiture. The customary procedure is that the criminal charge is tried first and, in a sense, lays the foundation for the forfeiture. One important issue in both the forfeiture proceeding and the criminal proceeding is whether or not a felony was committed. The procedure followed with respect to Straub raises due process questions beyond the claims in this case but the scenario does support the conclusion that Straub had a very legitimate reason for wanting access to legal resources to prepare himself for the civil forfeiture case.

Straub did not become aware of the civil forfeiture proceeding until June, 1982, when he was told that the State intended to take his automobile. However, even then he did not fully understand the workings of a civil

forfeiture. On July 8, 1982 he was taken from a jail to a hearing, and was informed by the judge that a final hearing on the civil forfeiture would take place on July 21, 1982. Straub was not represented by counsel at any of the forfeiture proceedings but he did request access to the law library. The judge did not rule on his request and Straub never gained any meaningful access to legal materials. The automobile was forfeited to the State on July 21, 1982, prior to Straub's criminal trial.

Denial of Access

From very early on in his detention Straub sought meaningful access to legal materials and to the courts. He wanted such access so that he could assist his counsel in the criminal case and so that he could represent himself in the civil forfeiture proceedings. Straub frequently asked jail officials to allow him access to a law library and such requests were made orally and in writing to persons responsible for his detention. Invariably, he was told to get a court order. Straub attempted to the best of his ability to file motions with the courts and gave such legal correspondence to jail officials for mailing but for some unknown reason most such materials never reached the court and no court ever provided Straub with the needed order. Straub even asked relatives to bring legal materials to him and at least one relative brought him photocopies of legal materials to the jail but they never reached him. During his period of detention at the Sarasota County Jail, Straub was denied meaningful access to the courts in attempting to defend the forfeiture action because access to a law library or use of adequate legal materials was denied him, and with respect to his civil forfeiture proceeding, such denial constituted a clear violation of a known constitutional right. *See Bounds v. Smith*, 430 U.S. 418 (1977).

Analysis of the Defenses

Throughout this litigation the defendants contended that Straub had no constitutional right to access to a law

library or legal materials for the purpose of assisting his counsel in the criminal case because his apopinted counsel provided him with meaningful access to the courts. With regard to the criminal case, the Court agrees with the defendants and finds no denial of plaintiff's right to access to the courts in that case.

As to the issue of Straub's right to meaningful access to the courts with regard to civil matters, primarily his civil forfeiture, the defendants have taken the position that Straub was not denied access because he could have gone to the law library had he gotten a court order as was required by jail policy and, most recently, they have argued that Straub was not deprived of any constitutional right because he really was not indigent and should have hired private counsel for the civil forfeiture.

During the time when Staub was detained at the Sarasota County Jail that facility had no law library or other means of providing detainees with legal materials in the jail but, seemingly, procedures were in place to take detainees to a county law library provided the detainee got a court order allowing him to go to that facility. Under that procedure the burden was on the detainee to file a motion with the local circuit court requesting an order telling the jail officials to take him to a library. The defendants stated that they generally would not oppose a motion for access to the law library but stated that a court order was necessary to give them authority to take a detainee from the jail to the library which was a public facility. The defendants admitted that there was no procedure in place for showing or otherwise informing the detainee how to go about getting a court order and that no one on staff at the jail provided any such assistance. Moreover, there was no mechanism in place for providing any legal materials to detainees who for whatever reason could not gain access to the law library.

The policy of the Sarasota County Jail with respect to access to the courts cannot withstand constitutional scru-

tiny. First, the policy and procedures place the detainee in the position of having to litigate in order to gain meaningful access to the courts when such access is his constitutional right. Second, from a practical standpoint, given the fact that most lay persons are untrained in the law, the policy places the detainee in an unreasonable and unjustifiable catch-22 position of having to have access to the courts in order to obtain the legal materials necessary to show him how to get across to the courts.

The defendants suggest that a court order is a reasonable requirement because some detainees should not be allowed in a public law library and they suggest that Straub may have been one such detainee because his defense to the armed robbery charge was that he suffered from post traumatic stress disorder (PTSD) as a result of his experience in Vietnam and a PTSD defense is a form of an insanity defense. The Court does not find fault in the suggestion that some detainees may not be appropriate for trips to the public law library but if that is the problem the State should have the burden of seeking a court order denying such access rather than force all detainees to seek court orders to gain access. Moreover, some reasonable meaningful alternative access must be provided to those who are denied access to the library. If the county wishes to save the expense of providing a law library within the detention facility then it must make certain that all detainees have meaningful access to legal materials from some other source and must not set up arbitrary and unreasonable hurdles, such as a court order requirement, that only discourages detainees and frustrates their lawful efforts. The defendants' blind adherence to the flawed access policy that they set in place was not warranted.

With regard to the defendants' argument that Straub really was not indigent when he was at the Sarasota County Jail the Court notes that he was judicially determined to be indigent at that time and that there is

no basis for concluding that such determination was incorrect. Defense counsel spent much of the trial trying to prove that Straub had certain income during 1982 and that he therefore was not indigent and must have lied about his income to the state court judge in order to get a public defender. Defense counsel even went so far as to make the rather cynical assertion that Straub was contributing too much money to the support of his wife and children, money which could have been used by him to hire counsel. Although the Court does note that Straub was not the most credible of witnesses on the issue of his income at various times, the defense has not shown that he lied to the state court judge or even that that judge was unaware of his income. As plaintiff's counsel pointed out, income is only one factor in a determination of indigency and it is certainly plausible that the state court judge appointed counsel for Straub despite the fact that he was receiving disability benefits from the Veterans Administration in the range of $1,200 per month. There is no doubt that Straub's unusual family situation and obligations would have entered into such a determination. The Court concludes that Straub was indigent during his detention in Sarasota County, that is, he did not have the resources necessary to retain private counsel. The Court further notes that Straub did seek assistance from legal aid groups but that such assistance was denied him because the defense of civil forfeiture actions were not within the priorities of those organizations.

It is worth noting that Straub's financial status in fact played no part in the defendants' decisionmaking or policy making in 1982 that caused the denial of access in this case. The "non-indigency" defense did not arise in this case until this Court took away Straub's indigency status a few months before the trial. In doing so this Court took way his right to proceed without court costs and fees. The Court has not made the kind of indigency determination about Straub in this case that the state

court judge would have made in appointing counsel for him.

The "non-indigency defense" has surfaced because defense counsel contends that the state does not have to provide meaningful access to the courts to inmates who are non-indigent because they should retain private counsel. The defendants rely on *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976) for the proposition that the state's constitutional burden of providing access to the courts depends on the detainees indigency status. Assuming, for the sake of argument only, that this Court had found that Straub was not indigent while he was at the Sarasota County Jail the Court would decline to follow *Wilson* for at least three reasons. First, the holding of *Bounds* is not susceptible to a fair interpretation that such discrimination between detainees based on wealth is allowable. Second, the portion of *Wilson* dealing with indigency status appears to be in the nature of dicta as it seems that aspect of the case was not developed in the lower court. Third, such distinctions simply are not workable. The logical extension of the defendants' argument is that some person or persons would decide which detainees are indigent and allow only those inmates access to a law library or legal materials while telling non-indigent inmates they must hire an attorney if they want access to the courts. Such a policy would be an administrative disaster area and only provide one more issue for a prisoner to litigate about, i.e., indigency status, for which litigation he would require meaningful access.

Qualified Good Faith Immunity

The defendants have raised the defense of qualified good faith immunity. However, the evidence in this case does not support such a claim of immunity. The constitutional right that was denied by these defendants was a clearly established one and one which a reasonable jailkeeper would have known. Moreover, it is clear from the evidence in this case that the defendants in fact knew that detainees have a constitutional right to meaningful

access to the courts and that such meaningful access includes access to legal resource materials.

Damages and Attorneys Fees

The evidence in this case supports a claim for damages. Considering all of the circumstances and the plaintiff's testimony the Court concludes that he suffered actual injury in the form of mental anguish and emotional distress as a result of the defendants' repeated denials of his right to meaningful access to the courts and to legal materials in regard to his civil suit. The nature of the injury, including the fact that the deprivation in this case was ongoing over a considerable period of time warrants an award of damages to the plaintiff in the amount of $3,000 and costs of this action. Although failing to sustain the claim as to plaintiff's criminal proceeding, plaintiff's counsel have prevailed on the claim as to the forfeiture action and are entitled to an award of reasonable attorneys fees.

Having considered the foregoing, it is

ORDERED:

1. That the Clerk shall enter final judgment for the plaintiff and against the defendants in the amount of $3,000 plus costs of this action.

2. That within fifteen days of this opinion counsel for the parties shall meet and confer in an effort to stipulate to a *reasonable* attorneys fees award in this case. If counsel are unable to reach some amicable accord on the fees issue the Court will accept briefs and affidavits on the fees award after thirty days from this opinion.

DONE AND ORDERED at Tampa, Florida this 19th day of March, 1986.

/s/ William J. Castagna
WILLIAM J. CASTAGNA
United States District Judge

Copies to
Counsel of Record

Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-375

IN THE
Supreme Court of the United States
OCTOBER TERM 1987

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY FLORIDA; MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL; and THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,

Petitioners,

Vs.

MICHAEL DENNIS STRAUB,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FORTHE ELEVENTH CIRCUIT

GEORGE K. RAHDERT, Esq. *
RAHDERT,ACOSTA & DICKSON
233 Third Street, N.
St. Petersburg, Florida 33701
(813) 823-4191

M. DAVID SHAPIRO, Esq.
BAKER & HOSTETLER
1300 Barnett Plaza
Post Office Box 112
Orlando, Florida 32802
(305) 841-1111

* Counsel of Record

Central Repro, Inc. Orlando, Florida 32801 (305-843-0707)

QUESTIONS PRESENTED

Whether the court of appeals was incorrect when it held that the finding of the district court that the Respondent was indigent were not clearly erroneous.

Whether a pretrial detainee or inmate is entitled to access to legal materials if the government does not provide legal assistance.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF CITATIONS	4
OPINIONS BELOW	5
STATEMENT	5
REASONS FOR DENYING THE PETITION	9
1. FACTUAL FINDINGS MUST BE CLEARLY ERRONEOUS BEFORE AN APPELLATE COURT CAN REVERSE THEM	9
2. THE DECISION BELOW FOLLOWED THIS COURT'S MANDATE IN *BOUNDS V. SMITH*	10
3. THE DECISION BELOW COMPORTS WITH EVERY DECISION IN EVERY CIRCUIT	12
CONCLUSION	17

TABLE OF CITATIONS

Cases: Page

Boddie v. Connecticut,
401 U.S. 371, 91 S. Ct. 780 (1971)..... 15

Bonner v. City of Prichard,
661 F. 2d 1206 (11th Cir. 1981)..... 15

Bounds v. Smith,
430 U.S. 816 (1977)..... passim

Chambers v. Baltimore & Ohio Railroad Co.,
207 U.S. 142, 28 S. Ct. 34 (1907)..... 15

Corpus v. Estelle,
551 F. 2d 68 (5th Cir. 1977).....13,15

Cruz v. Hauck,
627 F. 2d 710 (5th Cir. 1980)..... 13

DiBartolomeo v. State,
450 So. 2d 925 (Fla. 4th D.C.A. 1984)..... 8

Enrique v. State,
408 So. 2d 635 (Fla. 3d D.C.A. 1981)..... 8

Hooks v. Wainwright
775 F. 2d 1433 (11th Cir. 1985)..... 14

Jackson v. Procunier,
789 F. 2d 307 (5th Cir. 1986).....13,15

Morrow v. Harwell,
768 F. 2d 619 (8th Cir. 1985).....13,14

Roemer v. Board of Public Works of Maryland,
416 U.S. 736 (1976)..... 9

Ryland v. Shapiro,
708 F. 2d 976 (5th Cir. 1983)..... 13

United States v. Chatman,
584 F. 2d 1358, 1360 (4th Cir. 1978),
cert. denied, 482 U.S. 911 (1979).....14

United States, ex rel. George V. Lane,
718 F. 2d 226 (7th Cir. 1983)..... 15

United States v. Wilson,
690 F. 2d 1267 (9th Cir.1982)
cert. denied, 464 U.S. 867 (1983)..... 15

Wilson v. Zarhadnick,
534 F. 2d 55 (5th Cir. 1976)..... 13

Miscellaneous:

§ 27.52 (2), Florida Statutes..... 8

§ 27.52 (2) (C), Florida Statutes..... 8

42 U.S.C. § 1983..... 7

IN THE

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OCTOBER TERM 1987

NO. **87-375**

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY FLORIDA; MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL; and THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,

Petitioners,

Vs.

MICHAEL DENNIS STRAUB,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI TO THEUNITED STATES COURT OF APPEALS FORTHE ELEVENTH CIRCUIT

MICHAEL DENNIS STRAUB hereby responds to the petition for writ of certiorari to review the judgement and opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioners' App. 1a-17a) is reported at 815 F. 2d 1467. The opinion of the district court petitioners' App. 18a-26a) is not reported.

STATEMENT

1. On March 5, 1982, the Respondent, MICHAEL DENNIS STRAUB, was arrested for the armed robbery of a North Port bank. He remained in Sarasota County Jail until September of 1982 when he was transferred to Florida State Prison. During the course of the next three months, the Respondent made several unsuccessful attempts to obtain assistance of the Public Defender whom he believed had been appointed to his case. Straub, Tr. 7-10.

Plaintiff's Exhibit 12B. Concurrently, he made several requests to use a law library and to have legal materials brought to him by members of his family to begin working on his own defense. Straub, Tr. 14, 16, 17, 27.

Likewise, the Respondent met with at least two private attorneys in an effort to secure representation in the criminal matter. Straub, Tr. 110-114. Testimony at trial revealed that the cost to acquire private representation was beyond the Respondent's means. Straub, Tr. 110.[1] Prior to his first meeting with appointed counsel, the Respondent made several requests to use the law library in the criminal case. Several months after Respondent's incarceration, Respondent was served with a summons for the civil forfeiture of his automobile, naming him, as well as the automobile. At the time of the Respondent's incarceration, there was no library in the jail, thus requiring transportation to the County Law Library outside the jail, but nearby. 1.Tr. 26. Although there was no concern that Straub was a security risk, jail officials continually refused permission for his use of a law library on the basis of a written jail policy conditioning any access to law library on the acquisition of a court order. Specifically, the jail handbook stated, "*Law Library*, access to the law library will be granted upon receipt of a court order." No other instruction was provided. 1 Tr. 24, 26; Plaintiff's Exhibit 1.

The Respondent, in an attempt to comply with the policy, submitted several motions to the court seeking permission to use the law library and *his Black's Law Dictionary.* (Plaintiff's Exhibits 7, 13, 15.) He was never told of the outcome of these motions and was not permitted to visit the law library. 1 Tr. 22; Straub, Tr. 6, 15, 26-27. Also, the Petitioners did not permit Respondent to receive any copies of cases and statutes that family members brought to the jail. Straub Tr.17;1Tr.4. His attempts to gain any legal assistance failed. Straub Tr.62-64;1Tr 93-95.

Testimony at trial supported the finding of the district court that the Respondent was indigent at the time he was incarcerated at Sarasota County Jail. Testimony from the Public Defender revealed that both he and the state court judge were aware of the

[1] At this point in time, the Respondent was not aware of a civil forfeiture proceeding brought against him to forfeit his automobile. The testimony of the Respondent also revealed that he had been informed that the State would not be seizing his automoblie. (Straub, Tr. 140, 148.)

Respondent's full financial circumstances at the time he was appointed counsel. 1 Tr. 117. Likewise, unrebutted testimony revealed that the Respondent made several attempts to seek private counsel, but the costs were prohibitive. Straub, Tr. 110. Lastly, the confusion surrounding the civil forfeiture matter brought before his criminal trial, and naming him as a party, made it difficult for the Respondent to distinguish the two cases pending against him and assess his legal needs. Straub, Tr. 140, 148.

Petitioners' representation of the Respondent's financial situation is incorrect and inconsistent with the evidence at trial. Respondent did not purchase his former wife an automobile while incarcerated in the Sarasota County Jail. Straub, Tr. 98. Petitioners mislead the court by stating that the Respondent saved $3,000 while incarcerated. It should be noted that the evidence at trial revealed that the Respondent accumulated $3,000 during the course of his three year prison sentence, and not during his detention at Sarasota County Jail. Straub, Tr. 97. Evidence was received at trial that the Respondent had no accessible money while detained in the Sarasota County Jail. *Id.*

2. The present action arises from consolidated cases Respondent brought in the United States District Court for the Middle District of Florida against Petitioners. Respondent claimed damages under 42 U.S.C. §1983 for violation of his right of access to courts pursuant to this court's decision in *Bounds v. Smith*, 430 U.S. 816 (1977). After trial, the district court concluded the Respondent had been denied his right of access to the Courts in his civil forfeiture proceeding.

Additionally, the district court upheld the state circuit court's finding that the Respondent was indigent. Indeed, the district court heard testimony that the Respondent used all his money for support payments of his children and wife. Straub, Tr. 98. Based on the testimony and evidence at trial, the district court held that Respondent was indigent during the period he was incarcerated in Sarasota Country Jail. Regarding the Petitioners' emphasis on income, the district court stated, "[d]efense counsel even went so far as to make the rather cynical assertion that Straub was contributing too much money to the support of his wife and children, money which could have been used by him to hire counsel." Petitioners' App. at 24a.

The district court further noted that income was only one factor in determining the indigence of a detainee and that the state court judge considered the Respondent's family situation and obligation when making its determination. *Id.*

The district court also noted in its opinion that when it removed the Respondent's *informa pauperis* status, the court did not make the kind of indigency determination about the Respondent that the state court judge was obligated to make in its criminal matter. Despite the Petitioners' representation that the district court's determination of indigence was based "solely" on the fact that he was appointed Public Defender, the district court considered the factors set out in § 27.52(2), Florida Statutes (1985). *Id.* [2]

The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court. Petitioners' App. at 4a-5a. Despite the Petitioners' characterization that there was "clear and uncontroverted evidence" that the Respondent was non-indigent, the Court of Appeals reaffirmed that Respondent was indigent. The Eleventh Circuit noted that the district court, after a full hearing, determined that the Respondent was indigent at the time of his incarceration in the Sarasota County Jail. Petitioners' App. at 4a.

The United States Court of Appeals for the Eleventh Circuit also held that the financial status of the detainee has no bearing on the constitutional mandate of meaningful access to the courts as set out

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[2] Petitioners recognize that income is only one factor in an indigency determination, but they misrepresent the law. Under *Fla. Stat.* §27.52(2) (c), the court *must* consider the factors set out in the Statute:

> (c)The court shall also consider the additional circumstances in determining insolvency:
>
> 1. The probable expense and burden of defending the case;
> 2. The ownership of, or equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property by the defendant; and
> 3. The amount of debts owed by defendant or debts that might be incurred by the defendant because of illness or other misfortunes within his family.

Notwithstanding the assertions made by the petitioner, Florida law strictly requires this insolvency analysis and sole reliance of the affidavit of insolvency is error. *DiBartolomeo v. State*, 450 So. 2d 925 (Fla. 4th D.C.A. 1984); *Enrique v. State*, 408 So. 2d 635 (Fla. 3d D.C.A. 1981).

by this Court and *Bounds v. Smith*, 430 U.S. 817 (1977). The Court recognized that the *Bounds* decision required that the State shoulder affirmative obligations to assure *all* prisoners meaningful access to the courts. Petitioners' App. at 5a. (Emphasis in Opinion.)

The Eleventh Circuit held that this right of access applies to civil forfeiture cases, thus, affirming the decision in the district court awarding damages in the amount of $3,000 plus attorneys' fees and costs.

Judge Hill specially concurred in the opinion of the Eleventh Circuit. Although Judge Hill agreed that the Respondent was in fact indigent and the right of access extends to civil forfeiture matters, Judge Hill took issue with the majority's decision to extend this right to a non-indigent detainee. Petitioners' App. at 9a. Notably, Judge Hill stated that his comments were not to be interpreted as how he would rule if the case with a proper factual predicate would be before him. *Id.* at 17a.

REASONS FOR DENYING THE PETITION

Both the United States District Court for the Middle District of Florida and the United States Court of Appeals for the Eleventh Circuit held that: (1) the Respondent was indigent at the time of his incarceration at Sarasota County Jail, and (2) regardless of his financial situation, the Respondent was entitled to legal assistance by someone trained in the law or legal materials to help him defend or prosecute civil matters. Although the Petitioners repeatedly admonish both courts below regarding their findings of fact, they admit that in order to address the constitutional issue, this Court must initially address the factual issue that they concede is "unworthy of this Court's review." Petitioners' brief at 13 -14.

1. FACTUAL FINDINGS MUST BE CLEARLY ERRONEOUS BEFORE AN APPELLATE COURT CAN REVERSE THEM.

It has been well established by this Court that findings of fact will not be disturbed unless determined to be clearly erroneous and without support in the record. *Roemer v. Board of Public Works of Maryland*, 416 U.S. 736 (1976). This Court asserted that "[i]t is not

our place, however, to reappraise the evidence unless it plainly fails to support the findings of the trier of facts." *Id.* at 758. Moreover, this Court refused to second-guess the district court in certain matters even though its own decision may have been different. *Id.* Like the present case, the Petitioners in *Roemer* were requesting this Court to set aside certain findings of fact based on selected excerpts from the record that they believed supported their position. Finding support in the record for the lower court's findings, this Court refused to alter the judgement of the district court recognizing that the trier of fact is in a better position to evaluate the evidence than an appellate court with only a bare record to review. *Id.*

Despite Petitioners' repeated mischaracterization of the Respondent as a "non-indigent," three courts have held otherwise; the Florida Circuit Court, The United States District Court and the Eleventh Circuit. Indeed, the record is replete with evidence that the Respondent was indigent at the time of his incarceration at Sarasota County Jail. Evidence revealed that any money or income he was receiving went to his wife and children. Straub, Tr. 97-98, 129-135. Evidence established that the Respondent made several attempts to employ counsel but could not afford the representation. Straub, Tr. 110-114. Evidence further showed that the Respondent attempted to gain assistance through the Gulf Coast Legal Aid Service, but it declined since the organization did not consider his civil forfeiture as a priority case in its office. Straub, Tr. 22, (Plaintiff's Exhibit 16A, 16B, 16D). Respondent had no available money while in the custody of the Sarasota County Jail. Straub, Tr. 97.

2. THE DECISION BELOW FOLLOWED THIS COURT'S MANDATE IN BOUNDS V. SMITH.

The Petitioners have misinterpreted both the holdings of the Eleventh Circuit below and *Bounds v. Smith*, 430 U.S. 817 (1977). Petitioners *incorrectly* state in their brief that the Eleventh Circuit held "as a matter of constitutional right, all state prisoners -- regardless of wealth or adequacy of representation -- are entitled to access to law libraries and other materials in all litigation which those

inmates are involved." Petitioners' brief at 7. In actuality, the Eleventh Circuit's decision simply applied this Court's holding in *Bounds v. Smith*, 430 U.S. 817 (1977). The law of the Eleventh Circuit is that the government is obligated to provide all prisoners "with adequate legal libraries *or* adequate assistance from persons trained in the law." Petitioners' App. 7a, citing *Bounds*, 430 U.S. at 828. Consequently, the Petitioners entire argument is fallacious stemming from their incorrect reading of the decision below.

The Petitioners misstate the holding of this Court in *Bounds v. Smith*, 430 U.S. 817 (1977), by asserting that this Court mandated that "*indigent* prisoners have *minimally adequate* access to courts." Petitioners' brief at 9 (emphasis added). Rather, the holding in *Bounds* and recognized in the Eleventh Circuit's decision below was "[o]ur decisions have consistently required States to shoulder affirmative obligations to assure *all* prisoners' *meaningful* access to the courts." *Bounds*, 430 U.S. at 824 (cited with emphasis in the Eleventh Circuit Opinion, Petitioners' App. at 5a) The Eleventh Circuit recognized that indigent inmates are usually the ones affected, however, this Court did not intend to restrict this constitutional right of access, protecting only those within an undefined financial class.[3]

Contrary to the Petitioners' contentions, the Eleventh Circuit *did not* broaden the application of *Bounds* inasmuch as the inmate or detainee's wealth was never a factor in the equation, or considered by this Court. This Court has required that access be "adequate, effective and meaningful." *Bounds*, 430 U.S. at 822. That, in and of itself, is the only limiting factor. To suggest that the Eleventh Circuit's opinion leaves local governments virtually defenseless is patently erroneous. The opinion below merely confirms that *Bounds v. Smith* requires that prison authorities not avoid their responsibility of ensuring that inmates have either a law library or

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[3] Indeed, the district court recognized this distinction as an "administrative disaster area" that would require meaningful access to the courts to make an indigency determination, in order to gain meaningful access to the courts to prosecute and defend claims. Petitioners App. 25a. The district court also noted from the evidence at trial that the Respondent's financial status played no part in the Petitioners' access policies while the Respondent was incarcerated. Petitioners' App. at 24a; 1 Tr. 26-27, 129. The courts below were no doubt concerned that jail officials would attempt to second-guess or override the indigency determination by the court, as in this case.

adequate legal assistance to enable the prisoners or pretrial detainees to prepare meaningful legal papers, thus giving them constitutional access to the courts.

In the case *sub judice*, the district court ruled and the court of appeals affirmed, that the Petitioners' policy with respect to access did not pass constitutional muster. The record shows that Respondent was not permitted to use the law library, have anyone bring him legal materials (or newspapers for that matter), or offered legal assistance by anyone. Straub, Tr. 20-22, 29-30; 1 Tr. 20, 29-30. To the extent that local governments are now defenseless as to legitimate claims when in violation of *Bounds*, the decision below accomplished that task. However, this is not to say that the local governments will have to allow the inmate to choose his form of assistance. The holdings of both this Court in *Bounds*, and the Eleventh Circuit's opinion below charges local governments with the responsibility to provide some form of "meaningful" access, either through legal assistance, or the opportunity to allow inmates to at least help themselves. Neither decision requires a library that is complete with every legal treatise or reporter available as Petitioners suggest. Rather, legal materials must be supplied that would permit the inmate or pretrial detainee to have meaningful and effective access to courts. Neither opinion mandates a lawyer of the inmate or detainee's choice. Rather, both decisions require some form of legal assistance by someone trained in the law in the event that the inmate or pretrial detainee is not permitted to receive legal materials or permitted to use a law library.

3. The Decision Below Comports with Every Decision in Every Circuit.

Despite Petitioners' argument to the contrary, virtually every case decided by the United States Court of Appeals for the Fifth Circuit, subsequent to *Bounds*, has held that *all* prisoners or pretrial detainees, regardless of their financial worth, are entitled to either a law library or legal assistance. *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986); *Morrow v. Harwell*, 768 F.2d 619 (8th Cir. 1985); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Cruz v. Hauck*, 627 F. 2d 710 (5th Cir. 1980); *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977).

For example, in *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977), the court affirmed the judgment of the district court finding that the Texas Department of Corrections did not allow the prisoners access to the courts. Likewise, the court held that reasonable access to courts must include access in general civil legal matters including but not limited to divorce in small civil claims. *Id.* at 70.

The limited precedential significance of *Wilson v. Zarhadnick*, 534 F.2d 55 (5th Cir. 1976),[4] subsequent to *Bounds* comes into clear focus upon review of the Fifth Circuit's decision in *Morrow v. Harwell*, 768 F.2d 619 (5th Cir. 1985). In *Morrow*, the Fifth Circuit recognized that access to courts mandated by *Bounds* includes indigent and non-indigent inmates. As in the present case, a significant number of inmates were pretrial detainees. The court in *Morrow* recognized that meaningful access to the courts must be given by either providing a law library or assistance from someone trained in the law. In *Morrow*, the assistance came from university law students. The court noted that "[t]he students can assist prisoners only by providing copies of forms, cases, and other written legal materials. The copies are made for inmates at their request at a rate of ten cents per page, with free copies for indigents." *Id.* at 622.[5] The Fifth circuit applied the guidelines established in Bounds in the context of a civil case, to include both indigent and non-indigent inmates and detainees.

The United States Court of Appeals for the Eleventh Circuit correctly rejected "the fact" that the right of access is "inextricably tied to a concern with providing 'reasonably adequate' legal service to indigent inmates." Petitioners' brief at 9.[6] Both the district court and the Court of Appeals below recognized that the law of the Fifth Circuit is that the financial status of the inmate plays no part in the access to courts' analysis. *Cruz v. Hauck*, 627 F. 2d 710 (5th Cir.

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[4]Notably, *Wilson v. Zarhadnick*, 534 F. 2d 55 (5th Cir. 1976), has *never* been cited as legal authority for the proposition that only indigent inmates are entitled to the protection under *Bounds*.

1980). Addressing access in a civil case, the court in *Cruz* held:

> If *all* inmates do not have such access, the court should devise a plan ensuring adequate entry to the courts, either by reasonable access to attorneys *or* by a reasonable access to legal materials, *or* by any other means a district court may devise.

Id. at 719 (emphasis in original).

The Eleventh Circuit's opinion below is in accord with every circuit in the United States. In *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978), *cert. denied*, 482 U.S. 911 (1979), the Fourth Circuit addressed *Bounds v. Smith* in the context of a criminal matter. Recognizing that *Bounds v. Smith* mandated that the State provide the defendant with access to courts through either legal materials or someone trained in the law, the *Chatman* court held that the defendant's sixth amendment right to appointed counsel satisfies the constitutional requirement. The *Chatman* court noted that if the State exercises one of the options mandated in *Bounds*, the prisoner is not entitled to choose the alternative. Likewise, the Eleventh Circuit below held that the State must exercise at least one of the options to ensure access. Petitioners' App. at 6a. See also, *Hooks v.Wainwright*, 775 F.2d 1433 (11th Cir. 1985)*(en banc)*. In this case, both courts below held that the Petitioners neither offered legal assistance to the Respondent, nor access to any legal materials in any form. Petitioners' App. at 2a-3a. The record shows that the Respondent in this case tried several

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5 The court in *Morrow* held that this was insufficient legal assistance given the limited amount of materials that were provided to the inmates and pretrial detainees. Although the system in *Morrow* gave greater access to the inmates than the present case, it did not pass constitutional muster of "adequate effective and meaningful" access to courts. *Morrow*, 768 F.2d at 623.

6 This characterization of this Court's opinion is *Bounds* is misleading. This court stated in *Bounds* that prisoners must have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825. In order to accomplish this requirement, inmate access to the courts must be "adequate, effective and meaningful." *Id.* at 822.

avenues to gain access to the courts; evidence at trial revealed he would have accepted any form of access he could have achieved. Straub Tr. 14-16, 27-29, 62-64, 129-134, 141.

To the same affect is *United States v. Wilson*, 690 F. 2d 1267 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983). In *Wilson*, the Ninth Circuit opined that if the State offers legal assistance through the appointment of an attorney, an inmate is not free to reject that method and insist on another avenues of access of his or her choosing. *Id.* at 1271. Likewise, in *United States*, ex rel. *George v. Lane*, 718 F.2d 226 (7th Cir. 1983), the Seventh Circuit held that an appointed counsel is sufficient to satisfy *Bounds*, even if rejected by the inmate. *Id.* at 231. Nearly all of the cases cited by the Petitioners' involved access to the courts in criminal matters accomplished by the sixth amendment. Since there is no sixth amendment right to counsel in a civil forfeiture case, the decisions cited by the Petitioners have limited applicability.

In its opinion below, the Eleventh Circuit held that in the context of the civil forfeiture matter, the Respondent was denied legal assistance or legal materials and consequently received no meaningful access. Petitioners' App. at 2a. Since he had no sixth amendment right to counsel, and no assistance was offered, the county was under an obligation to furnish legal materials or allow use of an adequate law library.

The necessity of meaningful access to the courts in most civil matters has been well established. Indeed, in *Corpus v. Estelle*, 551 F. 2d 68 (5th Cir. 1977), the court held that the right of access to the courts must include access in general civil legal matters including but not limited to divorce and small civil claims.[7] Recently, in *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986), the Fifth Circuit reiterated this application of *Bounds*. *Id.* at 311. This Court has long recognized the right of access applies to civil claims. *Chambers v. Baltimore & Ohio Railroad Co.*, 207 U.S. 142, 28 S. Ct. 34 (1907); *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780 (1971).

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[7] The Eleventh Circuit adopted Fifth Circuit law as it existed on September 30, 1981, as binding precedent. *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) *(en banc)*.

The Petitioners overstate the effect of the Eleventh Circuit's decision below. Although they prophesize that the existence of the right to access "will almost certainly encourage some inmates to become more litigious," the very purpose of *Bounds* was to assist inmates in filing legal documents and avoid frivolous cases. *Bounds*, 43 U.S. at 831-832. Indeed, this Court stated:

> Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that their grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly.

Id. at 831-832. The Petitioners now seek to undermine and severely restrict this Court's decision in *Bounds v. Smith, supra* by asserting financial status at the determinative factor.

The petition to review the decision below should be denied as it is a logical application of previous decisions by this Court in a fact-specific context. The Constitution requires inmates or pretrial detainees to be provided legal materials through an adequate law library, or legal assistance by someone trained in the law.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

George K. Rahdert, Esq. *
RAHDERT,ACOSTA&DICKSON
233 Third Street, N.
St. Petersburg, Florida 33701
(813) 823-4191

M. David Shapiro, Esq.
BAKER & HOSTETLER
1300 Barnett Plaza
Post Office Box 112
Orlando, Florida 32802
(305) 841-1111

* Counsel of Record

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No. 87-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GEOFFREY MONGE, AS SHERIFF OF SARASOTA COUNTY, FLORIDA, MAX FRIMBERGER, AS CAPTAIN OF THE SARASOTA COUNTY JAIL, AND THE CHAIRPERSON OF THE SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,
Petitioners,

v.

MICHAEL DENNIS STRAUB,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF PETITIONER

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

RICHARD E. NELSON
NELSON, HESSE, CYRIL,
SMITH, WIDMAN & HERB
2070 Ringling Boulevard
Sarasota, FL 34237
(813) 366-7550

Counsel for Petitioners

* Counsel of Record

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TABLE OF AUTHORITIES

Cases: Page

Bee v. *Utah State Prison*, 823 F.2d 397 (10th Cir. 1987) ---------- 3
Bounds v. *Smith*, 430 U.S. 817 (1977) ---------- 2, 3
United States v. *Kozminski*, No. 86-2000 (cert. granted October 13, 1987) ---------- 3
Wilson v. *Zarhadnick*, 534 F.2d 55 (5th Cir. 1976) ---------- 3

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REPLY BRIEF OF PETITIONER

Respondent Straub argues that certiorari should be denied because (1) the holding that Straub was indigent while he was incarcerated in the County jail was not clearly erroneous (Opp. 6-8); and (2) the alternative holding—that a *non-indigent* prisoner must be afforded access to a law library or legal representation in a civil action—does not represent an expansion of this Court's holdings on the right of access to the courts. Opp. 9-12. Straub's arguments warrant a brief reply.

1. The single most important point in respondent's submission is his recognition that the Eleventh Circuit

unequivocally held that, regardless of his financial needs, Straub was entitled as a constitutional right to access to a law library to prepare for civil litigation. As Straub plainly states, the Eleventh Circuit "held that the financial status of the detainee has no bearing on the constitutional mandate of meaningful access to the courts . . ." Opp. 8. The holding below thus represents a significant expansion of the obligation, articulated by this Court in *Bounds*, "to provide adequate library facilities for the use of *indigent prisoners* seeking to file *pro se habeas* or *civil rights actions* . . . ." *Bounds* v. *Smith*, 430 U.S. 817 (1977) (emphasis added).

Thus, contrary to respondent's contention (Opp. 10-12), the Eleventh Circuit did not merely follow this Court's holding in *Bounds* in an uncontroversial manner.[1] The right announced in *Bounds* was designed to ensure that *indigent* inmates enjoyed a "*reasonably adequate* opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds*, 430 U.S. at 825. As Judge Hill noted, in his concurring opinion, the decision below "goes far beyond *Bounds*" to "give every prisoner the right to access to a law library for every perceived legal problem, whether or not he can afford legal counsel." App. 17a. The expansion of the right of access recognized in *Bounds* to non-indigent inmates, who can afford private counsel and thus have an adequate opportunity to present their case in court, imposes an unnecessary security risk and substantial financial burden on state and local governments. Pet. 8-10.

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[1] Straub quotes the *Bounds* opinion for the proposition that the state is obligated to ensure that "all prisoners [have] meaningful access to the courts." Opp. 11. Petitioners have never denied that this principle is the motivating rationale of the "right of access." Pet. 9-11. What respondent—and the Eleventh Circuit—fails to recognize or address is that a "non-indigent inmate with access to a lawyer *has* 'reasonably adequate opportunity' to present his case to the court" thereby obviating the need for state-funded assistance. Pet. 9.

Indeed, respondent does not dispute that the holding below imposes substantial costs. Instead, he argues that those costs are constitutionally required. The validity of that claim warrants review by this Court.

2. The petition also warrants review because the decision below conflicts with decisions of other courts of appeals. Petitioners demonstrated that the decision below is in conflict with at least four other circuits which offer more restrictive views of the "right of access" announced in *Bounds*. Pet. 10-13; see *Bee* v. *Utah State Prison*, 823 F.2d 397 (10th Cir. 1987) (*Bounds* only requires assistance to inmates at initial pleading stage). In particular, the Eleventh Circuit's decision plainly conflicts with *Wilson* v. *Zarhadnick*, 534 F.2d 55 (5th Cir. 1976), in which the Fifth Circuit held that the state is under no duty to provide an inmate with legal materials at public expense if the inmate can afford counsel. In response, Straub simply states that *Wilson* is of "limited precedential significance." Opp. 13. Respondent's assessment stands in stark contrast to the analysis of Judge Hill, who criticized the court below for "flatly overrul[ing] *Wilson*. . . ." Pet. App. 9a. That conflict warrants review by this Court.

3. Respondent's primary argument is that the finding of the district court that respondent was indigent renders the broader issue concerning respondent's right of access to legal materials unworthy of further review by this Court. There are two answers to this contention: First, the fact that a decision by this Court would not necessarily finally resolve this case in petitioner's favor, should not deter the Court from resolving the important question actually decided by the court of appeals. *Cf. United States* v. *Kozminski*, No. 86-2000 (cert. granted Oct. 13, 1987). A major expansion of a constitutional right which imposes significant burdens on governmental entities should not be insulated from review by this Court by labelling the decision as "dicta" or by attempting to

minimize its importance through a clearly erroneous alternative holding. Pet. 14.

Second, there can be no dispute that, contrary to Straub's affidavit of insolvency which he relies upon here, Straub clearly was not indigent while he was incarcerated in the County jail. In fact, Straub admitted making a "false statement" when, in his application to receive free legal services, he claimed he had no income. Straub Tr. at 92. Straub repeatedly testified that, at the time of his incarceration, he was receiving approximately $1200 a month from the Veterans Administration. Straub Tr. 33, 90, 127. Straub admitted that he was receiving additional educational benefits from the VA of $422—$511 per month. Straub Tr. 51-52. The extent of Straub's savings was in dispute, but the record includes a bank statement showing that Straub had $1375 in savings at the time of his arrest. Straub Tr. 84.[2]

Rather than addressing these issues directly, Straub attempts to obscure them by arguing that "Petitioner's representation" of other issues "is incorrect and inconsistent with the evidence at trial." Opp. 7. But, it is Straub whose characterization of the record is misleading. For example, Straub states that he "did not pur-

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[2] Despite Straub's contention that "the record is replete with evidence" of his indigency (Opp. 10), close examination of the record reveals that respondent is flatly contradicted in virtually every one of his assertions. For example, Straub states that "any money or income he was receiving went to his wife and children." Opp. 10. In fact, Straub testified that he had voluntarily "agreed" to pay his wife $500—$850 a month, substantially less than his income of $1,200 per month. Straub Tr. 93-94. He also misleadingly states that he made "several attempts to employ counsel" (Opp. 10), but those attempts related to efforts to employ counsel in his criminal matter—not in the civil action at issue here. Straub Tr. 110-111. In fact, his efforts to retain counsel in the civil forfeiture proceeding consisted of one letter requesting free legal services. Straub Tr. 22, 116.

chase his former wife an automobile while incarcerated in the Sarasota County Jail." Opp. 7. In fact, Straub did not "purchase" the car, but he authorized having the car payments made, out of his savings account, during the time period in question.[3] Similarly, Straub states that for "three months" he made "unsuccessful attempts to obtain assistance of the Public Defender." Opp. 5. In fact, the public defender met with Straub and entered an appearance on his behalf the day after his arrest. Straub Tr. 103.

While Straub is clearly correct (Opp. 9-10) that review of factual issues is typically not the province of this Court, such review is warranted where, as here, review of an important constitutional issue depends upon the proper resolution of a factual dispute. It is the court below and respondent who attempt to shield a critical issue of law from this Court's scrutiny. Before acquiescing in that effort, the Court should be convinced that there is a basis in the record for respondent's assertion. But even a generous reading of the record demonstrates no support for Straub's characterization in his brief in

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[3] The record (Straub Tr. 98) reflects the following colloquy:

> Q: Isn't it true that your mother testified . . . that she was authorized by you to purchase a new car for your wife for 2200 and some dollars.
>
> A: (by Straub): That's not true.
>
> Q: Did you authorize your mother to make any payments to your wife in the amount of . . . approximately $2200?
>
> A: $2100, yes, I did.
>
> Q: Okay. Was that for the purchase of a car?
>
> A: Of a car, yes.
>
> Q: What you're disputing is that it was new. It was a used car?
>
> A: Obviously, yes.

Any present uncertainty regarding Straub's financial status plainly can be attributed to respondent's lack of candor, and according to the district court (App. 24a), lack of credibility, regarding his income and expenditures.

this Court of his financial status while in jail.[4] And, what is even more important, Straub makes no attempt to dispute the *essential* fact that he did not meet the standards of indigency set forth in the Florida Statutes. Pet. 2-4, n. 5. The holding by the court below on this issue clearly was erroneous and should be no bar to reviewing the important alternative holding of the court of appeals concerning a non-indigent inmate's right of access to a law library.

* * * *

Respondent does not dispute that the Eleventh Circuit has now held that *all* inmates—regardless of wealth or adequacy of representation—are entitled to access to law libraries in order to pursue civil litigation. That decision imposes significant financial burdens upon state and local governments in Florida, Georgia and Alabama. Because the decision below represents a significant expansion of the right of access established by this Court and because of the importance of this issue to state and local governments and their taxpayers, this Court should grant the petition to resolve the issue whether non-indigent inmates are entitled to insist upon state-sponsored assistance in achieving access to the courts in civil proceedings.

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[4] Straub states that "Petitioners did not permit [him] to receive any copies of cases and statutes" that were brought to him by his family. Opp. 6. However, both Straub and his public defender testified that Straub received mimeographed copies of cases and other legal research materials from his public defender while incarcerated. I Tr. 98-100; Straub Tr. 111-112.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

REX E. LEE *
CARTER G. PHILLIPS
MARK D. HOPSON
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

RICHARD E. NELSON
NELSON, HESSE, CYRIL,
SMITH, WIDMAN & HER
2070 Ringling Boulevard
Sarasota, FL 34237
(813) 366-7550

Counsel for Petitioners

* Counsel of Record